

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of:

JACK M.

Claimant,

v.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH Case No. 2006020024

**DECISION**

Robert S. Eisman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter at the Westside Regional Center in Culver City, California, on March 24, 2006.

Martha Thompson, Fair Hearing Coordinator, Westside Regional Center (service agency) represented the service agency.

Wendy M. (claimant's mother) and Henry M. (claimant's father) represented Jack M. (claimant).<sup>1</sup>

The service agency and claimant's parents offered documents and sworn testimony, and argued the case.

The record was left open for claimant to submit claimant's most recent Individualized Education Program (IEP), as an additional exhibit, by no later than April 3, 2006, and for the service agency to submit any objection to receiving the IEP into evidence by no later than April 7, 2006.

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<sup>1</sup> Claimant and members of claimant's family are referred to by their first names and the first initial of their last name to protect their privacy. Claimant's relatives are also identified by their relationship to claimant.

In lieu of claimant's IEP, claimant's mother provided the following documents, which were received by the Administrative Law Judge on April 3, 2006, and marked for identification as indicated.

Claimant's Exhibit

- B Handwritten Letter, Kiddox Medical Group, Inc., (03/29/06)
- C "Report Card for Kindergarten" (4 pages)
- D Image of claimant titled "Jack [M.] 6½ years old"

There being no objection to these exhibits, they were all admitted into evidence. The record was then closed. The Administrative Law Judge deemed the matter submitted on April 10, 2006.

The Administrative Law Judge makes the following factual findings, legal conclusions, and order:

ISSUE

The parties agree that the following issue is to be resolved:

Should the service agency fund, through respite or some other means, claimant's participation in four (4) one-hour gymnastics class sessions per month, at a cost of \$60.00 per session?

FACTUAL FINDINGS

The following facts were determined by a preponderance of the evidence:

1. Claimant Jack M. is a six and one-half year-old male, born on July 12, 1999, who has been a consumer of the Westside Regional Center since he was diagnosed with Autistic Disorder at the age of three and one-half years. He lives at home with his parents and younger brother.
2. Claimant's parents characterize claimant as being a "high functioning" autistic child. They attribute his high functioning to the successes and progress claimant achieved through participation in the service agency's Early Intervention Program.
3. Pursuant to claimant's Individual Program Plan (IPP), which was last reviewed at an IPP team meeting on July 29, 2005, the service agency provides the following services and supports to claimant:
  - a. Funding of respite services.

b. Requesting medical records from claimant's physicians not less than annually for the purpose of updating claimant's chart.

c. Providing a counselor to assist with claimant's IEP process, including referring to and consulting with claimant's Education Support Team, and attending IEP meetings, if requested by claimant's parents and the counselor's schedule permits attendance.

d. Funding of claimant's social skills program.

4. Claimant's IPP does not contain a goal or objective that provides for service agency funding of claimant's participation in gymnastics/movement classes.

5. Claimant attends Farragut Elementary School (Culver City Unified School District), where he attends a regular kindergarten class, accompanied by a one-to-one aide. Claimant attends school on weekdays from 8:45 a.m. until 3:15 p.m.

6. The Culver City Unified School District provides claimant with the following special education services:

a. Sensory integration therapy.

b. Speech therapy.

c. Occupational therapy.

7. Claimant currently receives 14 hours of respite per month, which is provided through his parents being vendored with the service agency to provide that service. Claimant's parents use the money they receive for respite services to pay for claimant's gymnastics sessions. The parents have requested that respite hours be increased to pay for four (4) gym classes per month. If granted, claimant's respite hours would be increased by 14 hours per month.

8. The purpose of respite is to give caretakers a temporary break from supervising developmentally disabled children. Each family that can benefit from respite services has differing needs. The service agency has established general guidelines that it uses to determine the number of hours per month of respite that the service agency will fund. In general, the level of funding provided for respite services is based on an assessment of the intensity of care that the service agency's client needs. That is, the more intensive the care that is needed, the greater the amount of respite services that the service agency would fund. The service agency normally funds respite services in increments of seven hours (e.g., 14, 21, or 28 hours per month). (Westside Regional Center Service Standards, February 3, 1999, pp. 11-13.)

9. Although claimant had been receiving 14 hours of funded respite services per month, Ms. Thompson testified that based on a recent review of claimant's file, claimant is eligible to receive 21 hours of funded respite services per month. Ms. Thompson stated that the increase in respite hours would need to be documented through an amendment to claimant's IPP and that, in this case, the service agency will initiate action to make that change.

10. The service agency funds respite services at an established rate, which is currently \$8.57 per hour. (See Welf. & Inst. Code, §§ 4690 and 4690.2.)

11. Westside Regional Center's Service Standards provide that services and supports may be purchased only when they are related to special needs associated with a developmental disability.

In making purchase of service decisions consideration will be given to levels of need, to effectiveness and cost efficiency of services, to maximizing the utilization of generic resources and to the fulfillment of family responsibilities.

¶ . . . ¶

Services and supports may be purchased by Westside Regional Center only when they are related to special needs associated with a developmental disability or a condition determined by an interdisciplinary team to present a risk of developmental disability and, if a minor, which are beyond those normally associated with raising or providing for a minor in his/her own home.

Westside Regional Center will purchase only those services that help achieve the desired outcomes as identified in the planning process and that are considered cost effective. Purchase of service agreements will be time-limited and the results of those services reviewed for effectiveness. Services will be purchased on a continuing basis only if those services are accountable, of high quality, and demonstrate the achievement of desired outcomes in a cost effective manner.

Westside Regional Center will purchase only those services not available through generic resources or paid by insurance or public or private programs available to the consumer, and will give preference to the use of natural supports where it is anticipated that these will result in a more stable and enduring support system. . . .

¶ . . . ¶

The purpose of these standards is to provide guidelines for the use of Regional Center funds to provide services and supports to individuals. In applying these standards exceptions may be considered based on the specific needs of individuals and all relevant circumstances. The Purchase of Services Committee or the Executive Director must review service requests that require an exception be made to these standards.

(Westside Regional Center Service Standards, February 3, 1999, pp. 2-3.)

12. Parents/caregivers are given latitude in how they can use the funds allocated for respite services. For example, some parents/caregivers use these funds to allow the service agency's client to participate in a program such as gymnastics that, at the same time, provides the parents/caregivers relief from direct care of the client.

13. Although claimant was not interested in sports, claimant's parents have tried to involve him in several activities, including karate, without favorable results. However, in late summer/early fall 2005, claimant started attending gymnastics/movement classes at the Los Angeles School of Gymnastics twice a month. Claimant's parents quickly realized that through his participation in the gymnastics/movement classes claimant's coordination and gross motor skills had significantly improved.

14. Claimant's parents have used the respite funds they received from the service agency to pay for claimant's gymnastics sessions, which cost \$60.00 per session. As stated by claimant's father, additional funding support from the service agency would be applied to additional gymnastics classes, thereby relieving claimant's parents from having to incur those expenses.

15. To date, all of claimant's classes at the Los Angeles School of Gymnastics have been strictly one-to-one sessions that were each one hour long. However, claimant's parents hope that claimant will be able to be integrated into small group sessions in the near future. It is not known how participation in small group sessions will affect claimant's per session cost.

16. Claimant's parents presented a letter from Darryl J. Thompson, Director, Special Education Program, Los Angeles School of Gymnastics, which was received in evidence. In his letter, Mr. Thompson noted that due to his participation in gymnastics/movement classes, claimant had demonstrated improvement in several areas.

With respect to gross motor skills, initially claimant had difficulty with his coordination and ability to organize his body to complete a task through movement. He also had trouble learning/adjusting to more advanced skills. However, claimant "adjusted at a normal pace" and "with multiple demonstration and visual cues, he was able to imitate [the coach's] specific directions."

With respect to organizational behavior, which refers to activity level, goal-directed behaviors, attention, purposefulness of play, self-initiation of activities, complexity and creativity of play, and reactions to change, claimant exhibited high arousal, did not persist on tasks that challenged him, and his ability to stay focused on a task depended on the amount of distractions and level of task

difficulty. However, “after intense sensory input, problem solving skills improved which enhanced organization and focus on a task.”

With respect to sensory integration, claimant demonstrated a decreased sense of body awareness during movement and appeared to have sensory processing delays. However, claimant responded well to proprioceptive and vestibular input, which allowed him to focus his attention.<sup>2</sup>

17. As a result of claimant’s demonstrated progress, Mr. Thompson, suggested that claimant would benefit from continued success in the gymnastics program and recommended that he attend one hour, once per week, five sessions per month, working on-on-one with a gymnastics/movement specialist. He wrote that claimant’s continuation in the gymnastics program would result in improvements in the following areas: endurance capacity, overall strength, motor planning and coordination, motor skill development, sensory processing, autonomy, and self-direction.

18. Claimant’s parents did not provide any information regarding the specific qualifications, training, education, or experience of Mr. Thompson or other staff members at the Los Angeles School of Gymnastics who work with claimant.

19. In 2005, claimant’s parents requested that the service agency increase claimant’s respite hours to cover the cost of additional sessions per month at the Los Angeles School of Gymnastics.

20. The service agency’s interdisciplinary team considered claimant’s parents’ request, but the team consensus was that the additional funding would be considered an “enhancement,” meaning that the request was for funding that exceeded what was authorized for claimant’s respite services or therapy. The interdisciplinary team considered claimant’s parents’ request as seeking additional therapy for claimant. However, the parents did not support their request with any physician or therapist’s recommendation that gymnastics should be provided as a therapeutic modality.

21. Another factor and consideration that contributed to the service agency’s denial of claimant’s request was that gymnastics sessions at a school open to the general public would primarily be considered a social/recreational activity, which is a parental responsibility that would not be funded by the service agency.

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<sup>2</sup> The proprioceptive system gives the nervous system input on the position of muscles, joints and tendons. Proprioceptive inputs are important as they provide information such as how far to reach, how much pressure to apply, and the location of one’s body space. The vestibular system inputs are important for balance, muscle tone, equilibrium, the ability to use both sides of the body together, auditory language, and the coordination of head, neck and eye movements.

22. In a letter and Notice of Proposed Action, both dated December 13, 2005, the service agency notified claimant's parents that the Westside Regional Center Purchase of Service Committee had met to consider their request, but denied it because claimant only warranted 14 hours of respite per month. Fourteen hours of respite is the equivalent of two (2) one-to-one sessions per month at the Los Angeles School of Gymnastics.<sup>3</sup> Claimant's parents appealed the service agency's denial of additional respite hours and this hearing ensued.

23. Claimant's parent's now seek service agency funding for four (4) one-hour, one-to-one, gymnastics/movement sessions per month. Based on the future increase in claimant's respite hours from 14 to 21 hours per month, the total funds allocated for respite hours would cover three (3) such gymnastics/movement sessions per month.<sup>4</sup> Thus, when claimant's respite services are increased to 21 hours per month, claimant would only be unfunded for his participation in one gymnastics/movement session per month.

24. Claimant's parents provided a handwritten letter from claimant's pediatrician, Dr. Richard F. Levy, M.D. Dr. Levy is aware of claimant's participation in gymnastics classes and wrote:

Mr. Thompson, who works with special needs children like Jack, is recommending one more hour per month of gymnastics to enhance Jack's gross motor skills and strength to improve his coordination. I am in agreement and strongly request WRC to approve this request.

The service agency's interdisciplinary team did not have Dr. Levy's letter when they met to consider complainant's request for additional respite hours.

25. The Administrative Law Judge finds that Dr. Levy's letter, although well-intentioned, does not adequately describe the doctor's assessment and basis for recommending "one more hour per month" of gymnastics. As such, the Administrative gives limited weight to the letter.

26. Claimant's parents did not seek funding support for gymnastics/movement sessions from the Culver City School District and/or through claimant's IEP process.

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<sup>3</sup> 14 hours of respite at \$8.57 per hour amounts to \$119.98 per month. Two gymnastics sessions at \$60 each costs \$120.00 per month.

<sup>4</sup> 21 hours of respite at \$8.57 per hour amounts to \$179.97 per month. Three gymnastics sessions at \$60 each costs \$180.00 per month.

## LEGAL CONCLUSIONS

1. Jurisdiction was established to proceed in this matter, pursuant to Welfare and Institutions Code section 4710 et seq.

2. Except as otherwise provided by law, a party has the burden of proof as to each fact, the existence or nonexistence of which is essential to the claim for relief or defense that the party is asserting. (Evid. Code, § 500.) Where a claimant seeks to establish eligibility for government benefits or services not previously funded, claimant bears the burden of proof. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits); *Greator v. Board of Admin.* (1979) 91 Cal.App.3d 54, 57 (retirement benefits).)

In this case, claimant's parents seek additional service agency funding to be used for claimant's gymnastics/movement sessions, which is an expansion of the level of services being received. Therefore claimant carries the burden of proof and is obliged to adduce evidence that has more convincing force than that opposed to it.

3. Welfare and Institutions Code section 4512, subdivision (b) states, in pertinent part:

'Services and supports for persons with developmental disabilities' means specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives. **The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process.** The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option. Service and supports listed in the individual program plan may include, but are not limited to . . . treatment . . . recreation . . . community integration services . . . respite, short-term out-of-home care, social skills training . . . . Nothing in this subdivision is intended to expand or authorize a new or different service or support for any consumer unless that service or support is contained in his or her individual program plan. [Emphasis added.]

4. The services to be provided to any service agency consumer must be individually suited to meet the unique needs of the individual client in question, and within the bounds of the law each client's particular needs must be met. (See, e.g., Welf. & Inst. Code, §§ 4500.5, subd. (d); 4501; 4502; 4502.1; 4640.7, subd. (a), 4646, subd. (a); 4646, subd.(b); 4648, subd. (a)(1) and (a)(2).) Otherwise, no IPP would have to be undertaken.



5. Implicit in the Lanterman Act's requirement that a claimant's IPP forms the basis for determining which services and supports shall be funded by the service agency is the requirement that necessary assessments be conducted. A person who seeks benefits from a regional center must bear the burden of providing such information. In this instance, claimant's parents did not provide adequate information pertaining to either the necessity for claimant's gymnastics sessions from sources whose qualifications have been established, or the rate/periodicity at which gymnastics sessions should be provided. (See Welf. & Inst. Code, §§ 4646 and 4646.5.)

6. With respect to the service agency's funding guidelines, any service policies established by a regional center to govern the provision of services do not take precedence over the established individual needs of the consumer, which are ultimately paramount. (See *Association of Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 390-393.) Service agency policies are not inviolate. The purpose of service policies is to provide standards for supplying services to the service agency's consumers. Where it is established that such guidelines are not consistent with the Lanterman Act, or with a particular consumer's needs, it is the policies, not the welfare of the consumer, which must give way. (See *Williams v. Macomber* (1990) 226 Cal.App.3d 225, 232-234.)

[T]he Regional Center's reliance on a fixed policy is inconsistent with the Act's stated purpose of providing services "sufficiently complete to meet the needs of each person with developmental disabilities." (§ 4501.) The Act clearly contemplates that the services to be provided each client will be selected "on an individual basis." (*Association for Retarded Citizens v. Department of Developmental Services*, *supra*, 38 Cal.3d 384, 388.)

7. Services provided must be cost-effective (Welf. & Inst. Code, § 4512, subd. (b), *supra*), and the Lanterman Act requires the service agency to control costs so far as possible, and to otherwise conserve resources that must be shared by many consumers. (See, e.g., Welf. & Inst. Code, §§ 4640.7, subd. (b); 4651, subd. (a), 4659, and 4697.) To be sure, the obligations to other consumers are not controlling in the decision-making process, but a fair reading of the law is that a service agency is not required to meet a disabled child's every possible need or desire, in part because it is obligated to meet the needs of many children and families.

8. By law and by reference to the service agency's respite guidelines, respite is not a permanent service; rather, it is temporary, and gives the caregiver a break from supervising developmentally disabled children. Where other services may reduce the reliance on respite, they should be pursued. Respite services are only to meet claimant's care needs at a basic level and the service agency must balance the parents' ability to satisfy their parental responsibilities against the cost-effectiveness of delivering alternative services. (Welf. & Inst. Code, § 4690.2; Westside Regional Center Service Standards, February 3, 1999, pp. 11-12.) Respite is specified in Welfare and Institutions Code section 4685, subdivision (c)(1), as being "for parents."

9. In this case, respite funds are being used primarily as a service for the benefit of claimant. Claimant's gymnastics/movement classes are not specialized by the provider as a form of respite. The gymnastics/movement classes provide claimant's parents, at best, a break of only two or three hours per month. Since the service agency agrees to provide claimant's parents with 21 hours per month of respite, the current use of gymnastics/movement classes can hardly be viewed as an effective means of providing claimant's parents with relief from the constant demands and pressures of caring for their son.

10. The service agency is subject to certain fiscal constraints and budgetary limits. Consideration must be given to reflect the cost-effective use of public resources. (See Welf. & Inst. Code, §§ 4640.7, subd. (b), and 4646, subd. (a).) The service agency is required to "take into account in identifying the consumer's service needs the family's responsibility for providing similar services to a child without disabilities." (Welf. & Inst. Code, § 4791, subd. (e)(3)(A).) In this case, the gymnastics/movement classes appear to serve needs that are a typical family responsibility. The classes are not intended to serve as respite. Claimant did not establish that the service provider is vendored to provide specialized services to service agency consumers. The classes are open to the public, including typical children of claimant's age. The benefits claimant obtains are more akin to those received by typical children.

11. Welfare and Institutions Code section 4648, subdivision (a)(8), provides activities that the service agency shall conduct in order to meet the objectives of a consumer's IPP. Subdivision (a)(8), pertaining to the securing of needed services and supports, states: "Regional Center funds shall not be used to supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services."

12. Welfare and Institutions Code section 4659, subdivision (a) states, in pertinent part:

**[T]he regional center shall identify and pursue all possible sources of funding** for consumers receiving regional center services.

These sources shall include, but not be limited to, both of the following:

(1) Governmental or other entities or programs required to provide or pay the cost of providing services, including . . . **school districts** . . .

[Emphasis added.]

Thus, when a generic agency fails or refuses to provide a service agency consumer with those supports and services that are needed to allow that consumer to maximize his potential for a normal life, the Lanterman Act requires that the service agency make up the service shortfall. However, in this case the service agency and claimant's parents did not seek funding for gymnastics classes from claimant's school district. Therefore,

neither party could establish that claimant's school district had failed or refused to fund claimant's gymnastics classes.

13. Based on the entire record, it is evident that claimant realizes benefits from his participation in one-to-one gymnastics/movement classes, in that the classes have significantly improved his coordination, gross motor skills, ability to focus, attentiveness, problem-solving skills, and ability to learn/adjust to more advanced skills. Though these are clearly benefits, claimant did not establish by a preponderance of the evidence that they address his developmental disability, in that virtually all children can also obtain those benefits by participating in the classes.

14. Claimant did not establish by a preponderance of the evidence that the service agency's guidelines for funding respite or other services and supports was inconsistent with the provisions of the Lanterman Act or that claimant's participation in gymnastics/movement classes was necessary to address claimant's developmental disability.

15. Claimant did not establish that the service agency should increase claimant's respite funding to a level greater than the current 14 hours per month or the proposed IPP amendment to increase respite to 21 hours per month. Neither party provided evidence sufficient to determine the number of hours claimant should receive in the form of respite, either for its use either in the "traditional" sense of giving the parents a break from having to supervise claimant, or as a means of funding gymnastics classes.

16. Service agency funding of claimant's participation in gymnastics classes, either as a means of needed therapy or through funding of respite services above the currently authorized 14 hours per month, should appropriately be addressed through the IPP process and, if warranted, include consideration of cost-effective alternatives and funding from generic sources.

17. On behalf of the service agency, Ms. Thompson testified that based on a recent review of claimant's file, claimant's respite services will be increased to 21 hours per month. Once that occurs, since claimant's parents are self-vendored, they will receive the additional funding directly from the service agency. Although those funds are intended for respite services, the service agency acknowledged that the funds could be used to cover the cost of gymnastics classes. Funding for 21 hours of respite will be sufficient to cover the cost of three (3) gymnastics classes per month at the Los Angeles School of Gymnastics. If claimant's parents desire to have claimant attend gymnastics classes more often than three times per month, then they have a number of options available to them, including personally paying for the additional classes, seeking funding for all or a part of claimant's gymnastics classes through the IEP process in claimant's school district, and/or obtaining assessments from one or more qualified therapists or physicians that include a sufficient basis and recommendation for referring claimant to

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gymnastics classes. Such assessments would be extremely important and should be considered by the service agency's interdisciplinary team and/or claimant's IEP team.

### ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. Claimants' request that the service agency fund, through respite or some other means, claimant's participation in four (4) one-hour, one-to-one, gymnastics sessions per month, at a cost of \$60.00 per session, is denied.
2. The service agency shall honor its representation that it will initiate an amendment to claimant's Individual Program Plan whereby claimant's respite services will be increased to a total of 21 hours per month. Claimant's parents may apply all or a part of the funds received for respite services for claimant's participation in gymnastics classes.

**This is a final administrative decision, each party shall be bound by this decision. Either party may appeal the decision to a court of competent jurisdiction with 90 days of receiving notice of the final decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)**

April 12, 2006.

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ROBERT S. EISMAN  
Administrative Law Judge  
Office of Administrative Hearings